

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>GABRIEL CORREA,</b>	:	<b>CIVIL ACTION</b>
<b>Petitioner,</b>	:	
	:	
<b>v.</b>	:	<b>No. 12-1954</b>
	:	
<b>MICHAEL HARLOW, et al.,</b>	:	
<b>Respondents.</b>	:	

**REPORT AND RECOMMENDATION**

**TIMOTHY R. RICE**  
**U.S. MAGISTRATE JUDGE**

**July 24, 2012**

Petitioner Gabriel Correa, a prisoner at the State Correctional Institution in Albion, Pennsylvania, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Following the United States Supreme Court's decision in Miller v. Alabama, 132 S. Ct. 2455 (2012), Correa filed a motion requesting his federal petition be stayed and held in abeyance while he litigates in state court the applicability of that decision to his own sentence. Respondents have not opposed Correa's motion. For the reasons that follow, I recommend Correa's federal habeas petition be stayed and held in abeyance until the conclusion of his pending state court proceedings. See Rhines v. Weber, 544 U.S. 269, 278 (2005). If Correa does not return to federal court within thirty days following the conclusion of his state court proceedings, I recommend the stay and abeyance order be vacated and his habeas petition be dismissed without prejudice.

**FACTUAL AND PROCEDURAL HISTORY**

On June 21, 2002, following a jury trial, Correa was convicted of first-degree murder and related offenses. See Mem. at 1, Commonwealth v. Correa, No. 2170 EDA 2010 (Pa. Super. Ct. Sept. 27, 2011) [hereinafter PCRA App. Op.]; Pet. 28 U.S.C. § 2254 Writ Habeas Corpus Person

State Custody at 4, Correa v. Harlow, No. 12-1954 (E.D. Pa. Apr. 8, 2012) [hereinafter Pet.].

The charges stemmed from events that occurred on January 18, 2001 -- the day before Correa's seventeenth birthday. See PCRA App. Op. at 1; Bills Information, Commonwealth v. Correa, No. CP-51-CR-403693-2001 (Pa. Ct. Com. Pl. Phila. Apr. 12, 2001). The trial court sentenced Correa on December 11, 2002 to a mandatory term of life in prison on the murder charge.<sup>1</sup>

PCRA App. Op. at 1; Pet. at 4.

The Superior Court affirmed Correa's judgment of sentence on January 14, 2005, and the Pennsylvania Supreme Court denied review on June 9, 2005. PCRA App. Op. at 2; Pet. at 5-6.

On September 2, 2005 -- five days before his conviction became final -- Correa filed a pro se petition for relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § 9541, et seq. Pet. at 6; PCRA App. Op. at 2; see Swartz v. Meyers, 204 F.3d 417, 419 (3d Cir. 2000) (if state supreme court denies direct appeal, conviction becomes final when ninety-day period for seeking direct review in United States Supreme Court expires). Court-appointed counsel filed an amended petition, and the PCRA court denied relief on November 12, 2008. PCRA App. Op. at 2. The Superior Court affirmed on September 27, 2011, id. at 1, and the Supreme Court denied review on February 15, 2012, Criminal Docket at 18, Commonwealth v. Correa, No. CP-51-CR-403693-2001 (Pa. Ct. Com. Pl. Phila.) [hereinafter Docket].

Correa timely filed his federal habeas corpus petition and an accompanying memorandum of law on April 8, 2012. See Pet. at 19. He claims trial counsel was ineffective for failing to: 1)

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<sup>1</sup> Correa also received an aggregate, consecutive term of twelve-to-twenty-four years imprisonment for robbery, conspiracy, and possessing an instrument of crime. PCRA App. Op. at 1-2.

object to, or seek to exclude, “other bad acts” evidence; 2) object to the introduction of a cooperating witness’s plea agreement; 3) object to prosecutorial misconduct during closing arguments; and 4) object or seek a cautionary instruction in response to testimony that a witness was scared of Correa. See Pl.’s Br. Review at 1, Correa v. Harlow, No. 12-1954 (E.D. Pa. Apr. 8, 2012) [hereinafter Pet’r’s Br.].

On June 25, 2012, in a case involving a juvenile defendant who had been convicted of homicide, the Supreme Court held “that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’” Miller, 132 S. Ct. at 2460. The following week, Correa filed a second PCRA petition in state court, as well as a motion in federal court requesting that his habeas proceedings be held in abeyance pending resolution of his new state petition. See Docket at 19; Mot. Abeyance, Correa v. Harlow, No. 12-1954 (E.D. Pa. July 6, 2012) [hereinafter Mot. Abeyance]. In both filings, Correa cited Miller and asserted his mandatory life sentence is unconstitutional. See generally Mot. Abeyance.

### DISCUSSION

Correa’s federal habeas petition is a mixed petition, containing both exhausted and unexhausted claims. See Rhines, 544 U.S. at 273. For example, at least three of Correa’s challenges to trial counsel’s alleged ineffectiveness were exhausted in his first PCRA proceedings. Compare PCRA App. Op. at 2-3 (listing three counsel-ineffectiveness claims), with Pet’r’s Br. at 1 (arguably including the same counsel-ineffectiveness claims, with one divided into two discrete claims). Through his post-Miller motion, however, Correa apparently seeks to

amend his petition to add a challenge to the constitutionality of his mandatory life sentence.<sup>2</sup> See Mot. Abeyance. Such a claim has not been addressed by the state courts yet, although Correa is attempting to exhaust it now. See id. at ¶ 5; Docket at 19.

In Rhines, 544 U.S. at 278, the United States Supreme Court approved the use of stay-and-abeyance procedures for mixed habeas petitions. Pursuant to Rhines, a federal court should stay a mixed habeas petition and hold it in abeyance where “there was good cause for the petitioner’s failure to exhaust his claims first in state court.” Id. at 277. However, “even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless,” id., or where the petitioner “engaged in dilatory or abusive litigation tactics,” Grundy v. Pennsylvania, 248 F. App’x 448, 451 (3d Cir. 2007) (citing Rhines, 544 U.S. at 278).

Correa’s habeas petition should be stayed and held in abeyance pending the conclusion of his state court PCRA proceedings. See Rhines, 544 U.S. at 277-78. First, the Supreme Court had not yet decided Miller -- or its predecessor, Graham v. Florida, 130 U.S. 2011 (2010) (holding life-without-parole sentences for juveniles convicted of non-homicide offenses are unconstitutional) -- when Correa litigated his first PCRA petition, let alone when he was sentenced and pursued his direct appeal. Correa, therefore, had good cause for his previous failure to raise a constitutional challenge to his sentence in state court. See Rhines, 544 U.S. at 277.

Second, Correa’s unexhausted Eighth Amendment claim is not “plainly meritless.” Id.

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<sup>2</sup> Correa is well within his one-year federal limitation period, so his request to amend his petition and add a Miller claim is timely. See 42 U.S.C. § 2244(d); Leamer v. Fauver, 288 F.3d 532, 547 (3d Cir. 2002) (courts must construe pro se pleadings liberally).

There is no dispute that Correa was “under the age of 18 at the time of [his] crime[],” or that he received a sentence of “mandatory life without parole.” Miller, 132 S. Ct. at 2460; see 18 Pa. Cons. Stat. Ann. § 1102(a)(1) (sentence for first-degree murder in Pennsylvania is either death or life imprisonment); 61 Pa. Cons. Stat. Ann. § 6137(a)(1) (inmates serving life sentences in Pennsylvania may not be paroled). As such, Correa’s invocation of Miller appears to have merit, and it is both necessary and appropriate that his claim be considered first by the state courts. See Graham, 130 S. Ct. at 2030 (“It is for the State, in the first instance, to explore the means and mechanisms for compliance.”).

Finally, there is no indication Correa “engage[d] in abusive litigation tactics or intentional delay.” Rhines, 544 U.S. at 278. Within ten days of the Miller decision, Correa filed appropriate pleadings raising his sentencing claim in both state and federal court. Accordingly, use of the stay-and-abeyance procedure is warranted here.

A mixed petition, however, “should not be stayed indefinitely.” Rhines, 544 U.S. at 277. Reasonable time limits should be placed “on a petitioner’s trip to state court and back.” Id.; accord Bowen v. Palakovich, No. 06-3378, 2007 WL 1056821, at \*1 (E.D. Pa. Apr. 4, 2007). Correa’s stay and abeyance, therefore, should be conditioned upon his notifying the federal court within thirty days of the conclusion of his PCRA proceedings. See Bowen, 2007 WL 1056821, at \*1; Green, 2006 WL 2092575, at \*7. If Correa fails to notify this Court within thirty days of the conclusion of his state-court proceedings, the stay and abeyance should be vacated. See Crews v. Horn, 360 F.3d 146, 254 (3d Cir. 2004) (if the petitioner fails to meet the time limit, “the stay should be vacated nunc pro tunc”); Eckles v. Erickson, No. 06-1870, 2007 WL 106520, at \*8 (E.D. Pa. Jan. 9, 2007) (if petitioner fails to meet the time limit, “the stay and abeyance of

his federal habeas petition may be vacated, and his habeas petition may be dismissed.”).

Accordingly, I make the following recommendation:

## RECOMMENDATION

AND NOW, this 24th day of July, 2012, it is respectfully recommended the petition for a writ of habeas corpus be STAYED and held in ABEYANCE. It is further recommended that, if petitioner fails to return to federal court within thirty days of the conclusion of his state court proceedings, this order be vacated and his petition be DISMISSED without prejudice. Finally, it is recommended that there is no probable cause to issue a certificate of appealability.<sup>3</sup> The petitioner may file objections to this Report and Recommendation within fourteen days after being served with a copy thereof. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights. See Leyva v. Williams, 504 F.3d 357, 364 (3d Cir. 2007).

BY THE COURT:

/s/ Timothy R. Rice  
TIMOTHY R. RICE  
UNITED STATES MAGISTRATE JUDGE

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<sup>3</sup> Jurists of reason would not debate my recommended procedural or substantive dispositions of the petitioner's claims. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Therefore, no certificate of appealability should be granted. See id.

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<b>Respondents.</b>	:	

**ORDER**

**JUAN SANCHEZ, J.**

AND NOW, this                day of                , 2012, upon careful and independent consideration of the petition for a writ of habeas corpus, and after review of the Report and Recommendation of United States Magistrate Judge Timothy R. Rice, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. Petitioner's Motion for Abeyance (doc. 8) is GRANTED.
3. The petition for a writ of habeas corpus is STAYED and held in ABEYANCE until the conclusion of Correa's state court proceedings.
4. Correa shall return to federal court within thirty days following the conclusion of his state court proceedings. If Correa does not return to federal court within thirty days following the conclusion of his state court proceedings, this stay and abeyance order is vacated and his petition is dismissed without prejudice.
5. There is no probable cause to issue a certificate of appealability.

BY THE COURT:

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JUAN SANCHEZ, J.